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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE BUENO et al.,

Defendants and Appellants.

B282402

(Los Angeles County
Super. Ct. Nos.
BA437095-03, 04)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund W. Clarke, Jr., Judge. Affirmed.

Susan Morrow Maxwell, under appointment by the Court of Appeal, for Defendant and Appellant Jose Bueno.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant Jose Garcia Samano.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants Jose Bueno¹ and Jose Garcia Samano appeal from the judgment entered following their pleas of guilty to various cocaine-related offenses.² Before changing their pleas to guilty, defendants filed a motion to disclose the identity of a confidential informant pursuant to Evidence Code section 1042, subdivision (d). Defendants also moved to suppress evidence. Prior to the hearing on the suppression motion, the trial court conducted an in camera, ex parte hearing on the prosecution's possible pretrial assertion of the official information privilege (Evid. Code, §§ 1040-1042). The transcript of the in camera hearing was sealed. Defendants then moved to unseal the transcript, which the court denied.

Defendants argue that this court should review the sealed transcript of the in camera, ex parte hearing to ensure defendants' constitutional rights were not violated, specifically, their federal due process right to the disclosure of material, exculpatory evidence. (*Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*); *In re Sassounian* (1995) 9 Cal.4th 535, 543; see also *Giglio v. United States* (1972) 405 U.S. 150, 154 [exculpatory evidence includes impeachment].) Defendants further argue that they were denied notice of the in camera hearing in violation of their due process rights. The Attorney General agrees that this

¹ Bueno was charged and referred to as "Eddie Perez" throughout the criminal proceedings until the November 9, 2016, hearing, when he admitted his true name was Jose Bueno.

² Codefendants Jose Lopez and Eligio Manriquez are not parties to this appeal.

court should review the sealed transcript to determine whether the trial court acted within its discretion in denying disclosure based on the assertion of a privilege.

Bueno also contends the trial court erred in imposing a penalty assessment for a crime laboratory fee pursuant to Health and Safety Code section 11372.5.³ The Attorney General counters that the trial court erred by imposing insufficient fees and penalty assessments. We find no prejudicial error related to the in camera, ex parte hearing and affirm the judgment without modification to the fees and assessments.

II. BACKGROUND

A. *Statement of Facts*⁴

1. June 2, 2015, Incident

On June 2, 2015, members of an inter-agency task force known as L.A. IMPACT⁵ participated in surveillance of a Starbucks coffee shop located in Santa Fe Springs, California. They observed the following: Lopez and Manriquez arrived at the

³ Samano raised the issue of improper penalty assessments in his opening appellant brief. Bueno joined in Samano's arguments. Samano subsequently conceded the issue and agreed with the Attorney General's position.

⁴ The statement of facts is taken from evidence presented at the hearing for defendants' motion to suppress evidence.

⁵ L.A. IMPACT is an acronym for "Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force."

Starbucks in a silver Nissan Versa. They, a woman, and a small child got out of the Nissan and entered the Starbucks.

A short while later, Lopez walked out of the Starbucks and met with Bueno in the parking lot. Lopez handed something to Bueno, who then got into the Nissan and drove away.

L.A. IMPACT investigators followed Bueno to a nearby house on Charlesworth Road. Bueno made a quick turn into the driveway of the house. The driveway contained a tarp that was hung like a curtain such that once a car drove through the tarp, it was entirely concealed behind it. The investigators lost track of the Nissan until one investigator spotted it exiting the driveway.

Bueno then drove the Nissan back to the Starbucks, parked, and went to a different car. Lopez exited the Starbucks, went to the Nissan, looked in Bueno's direction, and gave him a nod. Lopez, Manriquez, the woman, and the child left in the Nissan.

Detective Sidney Abraham of the Huntington Park Police opined that Bueno and Lopez had engaged in a switch of narcotics or money. Detective Robert Carlborg of the Redondo Beach Police opined the same.

The Nissan was followed and subsequently stopped by a law enforcement officer. After searching the vehicle, the officer discovered packages of cocaine weighing approximately 50 kilograms in the hatch area of the car.

2. June 3, 2015, Incident

L.A. IMPACT investigators surveilled the Charlesworth house, and observed Samano and Bueno come out of the house, with Samano going back and forth between a car and the front

yard, and Bueno entering a white truck and backing it out from the driveway. Officers blocked Bueno's route and Bueno got out of the truck. Detective Carlborg, assisted by Detective Ixtzia Linares, who served as a Spanish language interpreter, told Bueno that the police were conducting a narcotics investigation and asked for permission to search the house. Bueno initially denied living at the house, but eventually admitted that he did. Bueno gave consent to search the house, but denied knowing what was in the garage. Detective Carlborg then spoke with a woman, who had exited the house. The woman gave consent for the house search and signed a written form. Detective Carlborg also spoke to Samano, with Linares serving as an interpreter. Samano initially denied living at the house, and then later stated he was renting a room there. Samano also consented to a search of the house. After conducting a search, law enforcement officers found in the garage packages of cocaine weighing approximately 256 kilograms.

B. *Procedural History*

The Los Angeles County District Attorney's Office (the District Attorney) filed their information against all four defendants on October 8, 2015. The District Attorney alleged that on June 2, 2015, Bueno possessed and transported cocaine for sale (counts one and two), and that on June 3, 2015, Bueno and Samano possessed and conspired to transport cocaine for sale (counts three and four). Furthermore, the District Attorney alleged for the June 2, 2015, incident that the amount of cocaine exceeded 40 kilograms (Health & Saf. Code, § 11370.4, subd. (a)(5)), and for the June 3, 2015, incident, the amount of

cocaine exceeded 80 kilograms (*id.*, § 11370.4, subd. (a)(6)).

Defendants pled not guilty to all counts.

On November 5, 2015, Bueno moved to suppress evidence from the search of the house. That same day, Bueno also moved for disclosure of the identity of a confidential informant, whom Bueno deduced, had told police the house on Charlesworth did not have to be observed on June 2, 2015, because the drugs had been loaded into the Nissan. Bueno argued this confidential informant could possibly demonstrate that Bueno had been “set up.” Bueno and Samano later joined in Lopez and Manriquez’s motion to suppress evidence seized from the Nissan.

On June 13, 2016, prior to the scheduled hearing on the motions to suppress evidence, the prosecutor requested and received an in camera, ex parte hearing. Defendants were not notified of the hearing until after it had occurred. The record contains a sealed transcript of the June 13, 2016, in camera, ex parte hearing.

On July 25, 2016, Lopez and Manriquez filed a motion to unseal the transcript of the hearing, or, alternatively, to dismiss the case. Bueno and Samano joined in their codefendants’ motion. Defendants argued that at the in camera, ex parte hearing, an officer or an informant presumably presented evidence that provided law enforcement with probable cause to stop and arrest them. The prosecutor denied that the hearing was an attempt to offer evidence in opposition to the motion to suppress evidence obtained during the June 2, 2015, detention of Lopez and Manriquez, and asserted that the hearing instead concerned the possibility that a witness might claim the official information privilege pursuant to Evidence Code sections 1040 to 1042.

On August 2, 2016, prior to hearing the motions to suppress evidence, the trial court denied defendants' motion to unseal the transcript of the in camera, ex parte hearing without prejudice. The court offered defendants the opportunity to submit questions to be asked of the unidentified individual at a second in camera hearing. The record indicates defendants did not submit any questions and did not move again to unseal the transcript.

On October 28, 2016, during the hearing on the motions to suppress, the court disclosed that Detective Carlborg was the witness who testified at the prior in camera, ex parte hearing. Detective Carlborg asserted the official information privilege, which the trial court allowed, when asked about the events that led to law enforcement conducting surveillance at the Starbucks parking lot.

Following the hearing on the motions to suppress, the court denied Bueno and Samano's motion to suppress evidence obtained from the search of the Charlesworth house.⁶ The trial court also denied Bueno's informant disclosure motion.

On November 9, 2016, Bueno changed his plea to guilty as to counts one and two. Bueno and Samano changed their pleas to guilty as to count three and count four. Defendants also admitted the special allegations for weight enhancements (Health & Saf. Code, § 11370.4, subds. (a)(5) and (a)(6).)

⁶ Manriquez's motion to suppress evidence was also denied, and he separately appealed. In an unpublished opinion, this court affirmed the denial order. (*People v. Manriquez* (Apr. 12, 2018, B281596) [nonpub. opn.])

C. *Sentencing*

On March 9, 2017, the trial court sentenced Bueno to the lower term of three years for count two for violation of Health and Safety Code section 11352, subdivision (a). Bueno received a weight enhancement of an additional 20 years pursuant to Health and Safety Code section 11370.4, subdivision (a)(5). As to count one, Bueno was sentenced to the middle term of three years for violation of Health and Safety Code section 11351, plus 20 years under Health and Safety Code section 11370.4, subdivision (a)(5). For each of counts three (Health & Saf. Code, § 11351) and four (Pen. Code, § 182, subd. (a)(1)), Bueno was sentenced to the middle term of three years. The trial court struck the weight enhancements for counts three and four under Penal Code section 1385, subdivision (c). The sentence on count three was to run concurrent with the sentence on count two. The sentences on counts one and four were stayed pursuant to Penal Code section 654. Of the aggregate 23-year sentence, the trial court ordered six years suspended as part of mandatory supervision. Bueno received 646 days of actual custody credits and 646 days of good time credit. The trial court imposed the following fines, fees, and assessments: \$300 restitution fine (Pen. Code, § 1202.4, subd. (b)); \$300 probation revocation fine (*id.*, § 1202.45), which was stayed; \$160 court operations assessment (*id.*, § 1465.8); \$120 criminal conviction facilities assessment (Gov. Code, § 70373); \$50 crime lab fee (Health & Saf. Code, § 11372.5, subd. (a)); plus \$85 penalty assessments, with \$50 pursuant to Penal Code section 1464 and \$35 pursuant to Government Code section 76000.

The trial court sentenced Samano to the lower term of two years for count three. Under Health and Safety Code section 11370.4, subdivision (a)(6), the trial court imposed a sentence enhancement of 25 years. Of the aggregate 27-year sentence, the court suspended 13 years for mandatory supervision. For count four, the trial court sentenced Samano to the middle term of three years, which it stayed. The trial court also struck the weight enhancement for count four. Samano received 1,292 presentence custody credits, comprised of 646 days of actual credit and 646 days of good time credit. The trial court imposed the following fines, fees, and assessments: \$300 restitution fine (Pen. Code, § 1202.4, subd. (b)); \$300 probation revocation fine (*Id.*, § 1202.45), which was stayed; \$80 court operations assessment (*id.*, § 1465.8); \$60 criminal conviction facilities assessment (Gov. Code, § 70373); \$50 crime lab fee (Health & Saf. Code, § 11372.5, subd. (a)); plus \$85 penalty assessments, consisting of \$50 pursuant to Penal Code section 1464 and \$35 pursuant to Government Code section 76000.

III. DISCUSSION

A. *Review of In Camera Hearing*

A prosecutor violates a defendant's due process rights by suppressing evidence material to the defendant's guilt or innocence, regardless of the prosecutor's good faith. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042; *People v. Lewis* (2015) 240 Cal.App.4th 257, 263.) Material evidence includes any exculpatory or impeachment evidence favorable to the accused. (*People v. Salazar, supra*, 35 Cal.4th at p. 1043.)

“When a defendant pleads guilty he or she . . . forgoes not only a fair trial, but also other accompanying constitutional guarantees.” (*United States v. Ruiz* (2002) 536 U.S. 622, 628-629; see *People v. Palmer* (2013) 58 Cal.4th 110, 114 [guilty plea “precludes appellate consideration of issues related to guilt or innocence, including the sufficiency of the evidence to support the conviction”].) An order denying a defendant’s informant disclosure motion is also unreviewable due to a guilty plea. (See *People v. Hobbs* (1994) 7 Cal.4th 948, 955-956.) “By so pleading, defendant[s] admitted [their] guilt of the charged offense Defendant[s] cannot admit [the charged offense] and then question the judgment on the ground that evidence [they were] not permitted to discover would have established to the contrary. The two positions are mutually inconsistent.” (*People v. Collins* (2004) 115 Cal.App.4th 137, 148.)

Where, however, a defendant has moved for the suppression of evidence pursuant to Penal Code section 1538.5, as the defendants did here, we “permit appellate review of denial of an informant motion to the extent the motion is ‘directed to the legality of the search.’” (*People v. Hobbs, supra*, 7 Cal.4th 948, 956 . . . ; see also *People v. Seibel* (1990) 219 Cal.App.3d 1279, 1285)” (*People v. Collins, supra*, 115 Cal.App.4th at p. 149.) Thus, we have reviewed the sealed transcript of the in camera, ex parte hearing and conclude the trial court properly denied defendant’s motion to disclose information about a purported confidential informant. Further, we observe no *Brady* or other constitutional violation.

Defendants also contend that they were denied their due process rights by not being notified of the in camera, ex parte hearing until after it had already occurred. Even if the trial court

erred in failing to notify defendants in advance of the hearing, any such was harmless. The record indicates defendants were provided an opportunity to submit questions to the trial court to ask the unidentified individual at a second in camera, ex parte hearing. (See *People v. Hobbs*, *supra*, 7 Cal.4th at p. 973 [in context of challenge to affidavit in support of search warrant presented at ex parte in camera hearing, defendant should be provided opportunity to submit written questions to be asked by trial judge].) Defendants did not submit any such questions or renew their motion for informant disclosure. In any event, we have reviewed the transcript of the hearing and conclude that there was no *Brady* or other constitutional error. Accordingly, we find no prejudicial error.

B. *Fines, Fees, Assessments, and Crime Lab Fee*

Bueno contends the penalty assessments were improperly imposed on the crime lab fee. We note that the trial court imposed a \$50 penalty assessment under Penal Code section 1464 and a \$35 penalty assessment under Government Code section 76000.

Bueno's argument that the penalty assessments do not apply to the crime lab fee fails. Our Supreme Court recently held that the crime lab fee under Health and Safety Code section 11372.5 is a fine. (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1109-1110.) The Court of Appeal cases that held otherwise, *People v. Martinez* (2017) 15 Cal.App.5th 659, *People v. Webb* (2017) 13 Cal.App.5th 486, *People v. Watts* (2016) 2 Cal.App.5th 223, and *People v. Vega* (2005) 130 Cal.App.4th 183, have been overruled as to this issue. (*Id.* at p. 1122, fn. 8.) Penalty assessments apply

to fines. (See Pen. Code, § 1464, subd. (a)(1) [“there shall be levied a state penalty . . . upon every fine, penalty, or forfeiture imposed”]; Gov. Code, § 76000 [“in each county there shall be levied an additional penalty . . . upon every fine, penalty or forfeiture imposed”].) Accordingly, Bueno’s position is not well-taken.⁷

The Attorney General contends that the trial court erred in failing to impose even higher fees and penalty assessments. While we recognize that we may correct a trial court’s omission of state and county penalties even when the People raise the issue for the first time on appeal (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157), we decline, on these facts, to correct any such errors here.

⁷ Bueno additionally argued that proposed legislation by the Legislature, Assembly Bill No. 2177, would amend Health and Safety Code section 11372.5 to read that “[t]he criminal laboratory analysis fee is not subject to penalty assessments authorized in Section 1464 of the Penal Code . . . or Chapter 12 (commencing with Section 76000), of Title 8 of the Government Code” (Assem. Bill No. 2177 (2017-2018 Reg. Sess.) § 1.) Assembly Bill No. 2177, however, did not pass.

IV. DISPOSITION

The judgment is affirmed.

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KIM, J.

We concur:

RUBIN, P. J.

MOOR, J.